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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

IN RE: RALPH MILLER,
Debtor,

RALPH MILLER,
Petitioner,
v.

FIRST FEDERAL OF MICHIGAN,
Respondent.

IN RE: EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
Debtors,

EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
Petitioners,
v.

MAXINE WYNN AND MANOR MORTGAGE CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Does the Bankruptcy Reform Act of 1978 permit a Debtor to cure a default on his residence after a foreclosure sale, as long as the default in question concerns property of the estate subject to the Bankruptcy Court's jurisdiction?

May a Debtor redeem his residence following a foreclosure sale by tolling the redemption period and paying the redemption amount through a Chapter 13 Plan?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ralph Miller and Edward J. Pigloski and Mary L. Pigloski ("Petitioners") pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on April 16, 1985, and the opinions of the Court of Appeals for the Sixth Circuit denying the Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc entered on June 3, 1985. Those decisions squarely present important bankruptcy issues which this Court should decide.

OPINIONS BELOW

The opinion of the Court of Appeals (A-1a) is to be published, but has not yet been assigned a number in the Federal Reporter. Neither the opinion of the District Court in Miller (A-36a) nor the District Court opinion in Pigloski (A-47a) are reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 16, 1985. The order denying the Petitioners' timely Petitions for Rehearing and Suggestion for Rehearing En Banc was entered on June 3, 1985. This Petition was filed within 90 days of that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 158, 1254(1) and 1334.

STATUTES INVOLVED

The statutes involved in the case are:

11 U.S.C. Section 108(b)

EXTENSION OF TIME

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

11 U.S.C. Section 362(a)

AUTOMATIC STAY

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under Section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 U.S.C. Section 1322(b)(2), (3), (5), (10)

CONTENTS OF PLAN

(b) Subject to subsections (a) and (c) of this section, the plan may—

* * * *

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of default;

* * * *

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

* * * *

(10) include any other appropriate provision not inconsistent with this title.

STATEMENT OF FACTS

The petitioners are perfect examples of debtors who sought the protection of the Chapter 13 bankruptcy system to survive a difficult, recessionary economic period. Both Ralph Miller and Edward Pigloski are long time hourly employees of the Chrysler Corporation who have endured lengthy and repeated lay-offs. Since filing their Chapter 13 plans they have paid Twelve Thousand Three Hundred ($12,300.00) Dollars and Eighteen Thousand Two Hundred ($18,200.00) Dollars, respectively, to the trustee in attempts to successfully complete Chapter 13 reorganization plans. However, if *In re Glenn, et ux*, No. 82-3821, 83-1316, 83-1585 (6th Cir. April 16, 1985)

(A-1a), stands those payments will go for naught and the Petitioners will lose their homes.[1]

Ralph Miller

Mr. Miller purchased his home in Detroit, Michigan on August 5, 1980, for $26,500.00. It was subject to an existing mortgage held by respondent, First Federal of Michigan, with a balance of $20,900.00.

Following layoff from the Chrysler Corporation, Mr. Miller defaulted on the mortgage in 1981. First Federal commenced a non-judicial foreclosure by advertisement in March of 1982. On May 14, 1982, in the lobby of the City-County Building, a sheriff's sale was held. First Federal, the sole bidder, purchased the property, bidding the mortgage balance.

On November 2, 1982, before the statutory redemption period expired, Mr. Miller elected to use his Congressionally mandated right to reorganize his debt. In need of a breathing space to allow the conditions causing his indebtedness to pass, Mr. Miller filed a Chapter 13 petition and plan. In his plan, Mr. Miller proposed to cure his mortgage default by paying the arrearage and maintaining the current payments on the note at the rate of $96.00 per week.

Mr. Miller also moved the bankruptcy court to issue a stay order tolling the redemption period. The bankruptcy court denied the motion, denied confirmation of the plan, and lifted the automatic stay as to First Federal, allowing the mortgagee to pursue eviction.

Mr. Miller appealed these decisions to the district court. Judge Thornton reversed the bankruptcy court,

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[1] Parties to the proceeding in the court below were:

The Federal Land Bank of Louisville, Creditor-Appellant; Gerald David Glenn and Janice Sue Glenn, Debtors-Appellees; Edward J. Pigloski and Mary Pigloski, Plaintiffs-Appellants; Maxine Wynn and Manor Mortgage Company, Defendants-Appellees; First Federal of Michigan, Defendant-Appellant; Ralph Henry Miller, Plaintiff-Appellee.

holding that 11 U.S.C. Section 1322(b)(5) permits a Chapter 13 debtor to set aside a foreclosure sale, pay any arrearage, and reinstate the terms of the mortgage when the petition is filed before the redemption period expires.

The Sixth Circuit Court of Appeals reversed Judge Thornton and restricted the right to cure defaults on principal residences, under 11 U.S.C. Section 1322(b), to situations prior to a mortgage foreclosure sale. The Sixth Circuit adopted this position even though the Petitioner was in possession of the premises, and had filed a Chapter 13 prior to the expiration of the redemption period, and the purchaser at the sale was not a bona-fide third party.

Edward and Mary Pigloski

Edward and Mary Pigloski also sought the protection of the Chapter 13 provisions of the Bankruptcy Code (the "Code") while their home was in the redemption period after a foreclosure by advestisement pursuant to the Michigan statutory scheme. The foreclosure proceeding was instituted by respondent Maxine Wynn, who held a junior lien on the Pigloski property.

The home was encumbered by an existing first mortgage to Standard Federal Savings & Loan Association when the Pigloskis first began experiencing financial difficulties. As an initial solution to their problems, they entered into a loan agreement, arranged by Manor Mortgage Company, which required them to execute a mortgage and mortgage note in favor of respondent Maxine Wynn. The principal amount of the loan was $5,800.00. The petitioners only received $4,000.00, however, with $1,300.00 owing to Manor as a "brokerage fee" and the remainder covering certain costs. The transaction was characterized as a wrap-around mortgage with a blended interest note. To receive the loan the Petitioners were required to incorporate, since the interest rate charged exceeded 20%. Faced with a high combined mortgage payment and a job layoff, the Petitioners defaulted on their mortgage payment to Mrs. Wynn. She commenced fore-

closure by advertisement. Maxine Wynn purchased the property for the combined principal balances of both mortgages at a sheriff's sale held on November 20, 1981.

The Pigloskis filed their emergency Chapter 13 petition on April 30, 1982, and their Chapter 13 Plan on May 10, 1982, prior to the expiration of the redemption period.

In their Chapter 13 Plan, the Petitioners proposed to pay all amounts due and owing to Maxine Wynn within two and one half years. Shortly after filing their Chapter 13 petition, Petitioners moved the Bankruptcy Court for a Temporary Stay Order Tolling the Redemption Period and Restraining Order. They also argued that they could propose a plan to cure the arrearages on the mortgage through their Chapter 13 while maintaining current payments through the plan.

Bankruptcy Judge Graves held that the court had no authority to toll the statutory redemption period, and read into the record the court's opinion, which was eventually issued and reported as *In Re James*, 20 B.R. 145 (Bkrtcy. E.D. Mich. 1982). The Pigloskis appealed the decision to the District Court. In a Memorandum Opinion, Judge Boyle, then of the Federal Court for the Eastern District of Michigan, affirmed the Bankruptcy Court. (A-47a).

The Sixth Circuit Court of Appeals, in its opinion issued as *In Re Glenn, et ux* (A-1a), affirmed the Bankruptcy Court and the District Court.

In both cases, the parties stipulated to stay further proceedings while the appeals to the District Court and the Court of Appeals were pending. Under the stay now in effect, $133.00 per week is withheld from Mr. Pigloski's paycheck. From these monies, the Chapter 13 trustee makes the first mortgage payment each month and also distributes $101.13 to Maxine Wynn on the second mortgage. To date the Pigloskis have paid Eighteen Thousand Two Hundred ($18,200.00) Dollars to the trustee. By maintaining his payments of Ninety-Six

($96.00) Dollars per week to the trustee, Mr. Miller has paid over Twelve Thousand Three Hundred ($12,300.00) Dollars to the trustee.

REASONS FOR GRANTING THE WRIT

To date numerous courts have struggled with the proper interpretation of 11 U.S.C. Section 1322(b), trying to define a cohesive theory that determines the circumstances under which a Chapter 13 debtor may "cure" a mortgage default on his principal residence.[2] While

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[2] The circuits are uniform in holding that a debtor may cure a default once a mortgage debt has been accelerated. *In Re Taddeo*, 685 F.2d 24 (2nd Cir. 1982), *Grubbs* v. *Houston First American Savings Association*, 730 F.2d 236 (5th Cir. 1984) (en banc), *Matter of Clark*, 738 F.2d 869 (7th Cir. 1984), and *In Re Glenn*, *supra*.

The current disagreement is at what point after acceleration may the mortgage default be cured. The differing viewpoints are:

(1) Courts that hold that a debtor may cure a default where the mortgage debt has been accelerated provided that no foreclosure judgment has been entered: *Percy Wilson Mortgage & Finance Corp.* v. *McCurdy*, 21 B.R. 535 (Bkrcty.D.Conn. 1981); *In re Pearson*, 10 B.R. 189 (Bkrtcy. E.D.N.Y. 1981).

(2) Courts that hold that a debtor may cure a default where a state court judgment of foreclosure has been entered provided that no sale has taken place: *In re Acevedo*, 26 B.R. 994 (D.E.D.N.Y. 1982); *In re James*, 20 B.R. 145 (Bkrtcy.E.D. Mich. 1982); *In re Brantley*, 6 B.R. 178 (Bkrtcy.N.D.Fla. 1980); *In Re Glenn, supra*.

(3) Courts that place no express limitation on the debtors right to cure a default after acceleration: *In re Taddeo*, 685 F.2d 24 (2nd Cir. 1982); *Matter of Clark*, 738 F.2d 869 (7th Cir. 1984); *Grubbs* v. *Houston First American Savings Association*, 730 F.2d 236 (5th Cir. 1984) (*en banc*); *In re Sapp*, 11 B.R. 188 (Bkrtcy.S.D.Ohio E.D. 1981); *In re Davis*, 16 B.R. 473 (D.Kan. 1981). Or after a judgment has been entered: *In re Young*, 22 B.R. 620 (Bkrtcy.N.D.Ill. E.D. 1982); *In re Breuer*, 4 B.R. 499 (Bkrtcy.S.D.N.Y. 1980).

(4) Courts that hold that a debtor may cure a default where a foreclosure sale has been held provided that the debtor's right of redemption under state law has not expired: *In re Ivory*, 32 B.R. 788 (Bkrtcy.D.Or. 1983); *In re Johnson*, 29 B.R. 104 (Bkrtcy.S.D.Fla. 1983); *In re Chambers*, 27 B.R. 687

these courts have come to a variety of results based on similar facts, the case that provides the conceptual framework is *In Re Taddeo*, 685 F.2d 24 (2d Cir. 1982). *Taddeo* focuses on the right to cure defaults and the return of the debtor to the *status quo* prior to the default. The right to cure exists as long as the debtor retains an interest in the property at the time of filing the Chapter 13.

On a theoretical level, the Sixth Circuit in *Glenn* has broken with the conceptual framework of *Taddeo*. The *Glenn* opinion focuses not on the triggering event (the default), but on the status of the foreclosure proceedings at the time of filing the Chapter 13. In an admitted compromise, the Sixth Circuit draws a bright line at the sale. A debtor can cure before a sale; after a sale a debtor may not cure or even redeem.

The *Glenn* opinion is an opinion crafted on the basis of administrative convenience and compromise. If the frame of reference for interpreting the Bankruptcy Reform Act is "line drawing", then one could consider *Glenn* a good decision. If, the frame of reference is the rehabilitative purposes of Chapter 13 and federal bankruptcy policy, then *Glenn* inflicts significant damage to Congress' intent to rehabilitate debtors through payment plans. The *Glenn* opinion judicially denies access to the Chapter 13 procedure to a class of debtors most in need of Chapter 13 protection.

On a practical level, the holding of the Sixth Circuit also directly conflicts with results stemming from the Second Circuit opinion. If *Glenn* is not reversed, similarly situated debtors in the Sixth Circuit will be treated differently than those in the Second Circuit. In the Sixth Circuit, a debtor will lose his family home after the foreclosure sale. In the Second Circuit, as long as the debtor retains an interest in the property, the debtor will be able to pay the mortgagee its due within the Chapter 13

(Bkrtcy.S.D.Fla. 1983); *In re Taylor*, 21 B.R. 179 (Bkrtcy. W.D.Mo. 1982); *In re Thompson*, 17 B.R. 748 (Bkrtcy.W.D. Mich. 1982), or whose theory supports such a holding. *In re Taddeo*, 685 F.2d 24 (2nd Cir. 1982).

Plan, subject to the strict procedural safeguards that protect the mortgagee's security interest in the home.

In order to avoid continued confusion in the circuits, it is essential that this Court interpret federal bankruptcy law. This Court should reaffirm the right of debtors to cure defaults on residential mortgages as long as the debtor retains an interest in the property under state law, and guarantees creditors adequate protection of their security interest.

I. The Sixth Circuit in *Glenn* Expressly Limits a Debtor's Right to Cure Defaults Contrary to Federal Bankruptcy Policy and the Second Circuit's Decision in *Taddeo*.

The Sixth Circuit in *Glenn* is the first circuit to place an express limit on the debtors' right to cure a default after acceleration. Furthermore the holding of the Sixth Circuit directly conflicts with the theory of the Second Circuit as expressed in *In re Taddeo*, *supra*, at 24.

The *Glenn* opinion requires that bankruptcy courts look to see whether a sale has been held under state mortgage foreclosure law. Once that sale has occurred, the debtor's right to cure a default of the mortgage is terminated. In creating this "bright line", the Sixth Circuit focuses not on federal bankruptcy law concepts to determine how the line should be drawn, but instead on an identifiable event in the foreclosure process. By chosing an "event", the Sixth Circuit defers to the vagaries of state law to shape federal bankruptcy law policy. Thus the Sixth Circuit makes the Congressionally mandated policy of allowing debtors to cure mortgage defaults turn on whether or not a foreclosure sale has occurred under state law. That in turn results in similarly situated debtors receiving different treatment despite the guarantees of uniform bankruptcy law.

A. *Federal Bankruptcy Law Requires Uniform Treatment of Debtors in Chapter 13 Proceedings Who Are Subject to State Law Mortgage Foreclosures.*

The Federal Constitution, Article I, Section 8, gave Congress the power to establish uniform laws on the sub-

ject of bankruptcy throughout the United States. The Supreme Court has long recognized that Congress need not exercise that power. *Butner* v. *United States*, 440 U.S. 48, 54, (1979). However, once that authority is exercised state laws that conflict with the federal bankruptcy system are suspended. *Stellwagen* v. *Clum*, 245 U.S. 605, 613.

Thus, while Congress might choose to recognize state law that leads to different results in different states, Congress could equally choose to impose a uniform federal treatment, especially where there is an identifiable federal interest. *Butner* v. *United States*, *supra* at 55.

Petitioners suggest that Congress has identified a specific federal interest in protecting debtors' homes by allowing the curing of a default in Chapter 13. Petitioners further suggest that the concept of "curing a default" is one of federal bankruptcy law that requires uniform interpretation throughout the United States.

B. *The Bankruptcy Reform Act of 1978 Grants Debtors the Power to Cure Mortgage Defaults, Even After Foreclosure, as Long as the Default in Question Concerns Property of the Estate Subject to Bankruptcy Court Jurisdiction.*

The filing of a bankruptcy petition creates an estate comprised of "all legal or equitable interest of the debtor in property as of the commencement of the case," regardless of who holds the property or where it is located. 11 U.S.C. Section 541.

Upon confirmation of a plan of reorganization, the debtor remains in possession of his property, subject to the payment of claims that may or may not be secured by the property. 11 U.S.C. Section 1306(b); 11 U.S.C. Section 1322(b).

11 U.S.C. Section 1322(b) states how those claims may be treated in the Chapter 13 plan.

* * * *

(b) Subject to subsections (a) and (c) of this section, the (Chapter 13) plan may—

* * * *

> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, . . .
>
> * * * *
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

Subsection (5) allows a debtor to cure a mortgage arrearage during the life of the plan while maintaining current payments. The only limitations imposed on this right are (1) the default must be cured within a reasonable time, (2) the amount of the mortgage payment may not be reduced by the Chapter 13 Plan, and (3) the term of the mortgage must extend beyond the length of the plan.

C. *The "Bright Line" Created by the Sixth Circuit Ignores the 11 U.S.C. Section 1322(B)(5) Power to Cure Defaults Emphasized in* Taddeo.

In Re Taddeo, supra, eschews the "bright line" approach of *Glenn*. Instead of focusing on a point in time in the state law foreclosure process, the Second Circuit looks to the Bankruptcy Code's power to cure defaults. The court in *Taddeo* maintains simply that debtors have the power to cure defaults on residential mortgages as long as the property is subject to bankruptcy court jurisdiction. The proper focus is not on the consequences of the default. That result can be as varied in time and effect as the differences in acceleration, foreclosure by advertisement, judicial foreclosure, a sheriff's sale, final judgments and sales, an equity of redemption or statutory redemption.

Instead the key point is the default and the federal bankruptcy power to cure defaults under 11 U.S.C. Section 1322(b). The court in *Taddeo* explains that:

> . . . a default is an event in the debtor-creditor relationship which triggers certain consequences—here, acceleration. Curing a default commonly means taking care of the triggering event and returning to pre-default conditions.

In re Taddeo, 685 F.2d at 26-27.

The Second Circuit then held that "(w)hen Congress empowered Chapter 13 debtors to "cure defaults," we think Congress intended to allow mortgagors to "de-accelerate" their mortgage and reinstate its original payment schedule." *In re Taddeo*, 685 F.2d at 24, 26.

The theory of the "power to cure" is that since creditors receive all payments due, curing a default does not materially affect their rights. In discussing the voting rights of creditors under Chapter 11, Congress gave specific insight as to the power to cure:

> This section is new. It is designed to indicate when contractual rights of creditors or interest holders are not materially affected.
>
> * * * *
>
> Second, the Plan is permitted to reinstate a claim or interest and thus leave it unimpaired. Reinstatement consists of curing any default (other than a default under an *ipso facto* or bankruptcy clause) and reinstatement of the claim or interest.

House Judiciary Report, H.R. Rep. No. 95-595, 95th Cong., 1st Sess., p. 403 (1977).

The Senate Report was even more explicit:

> This section is designed to indicate when contractual rights of creditors or interest holders are not materially affected.
>
> * * * *
>
> Second, a claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default. The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or in-

> terest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain. Curing of the default and the assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.

S. Rep. No. 989, 95th Cong., 2d Sess. 120 (1978).

Mortgagees typicially counter with the argument that the curing of a default must be a "modification" under the language of 11 U.S.C. Section 1322(b)(2). However, according to 11 U.S.C. Section 1123 a plan may *either* modify any lien (E) or cure any default (G). Curing a default is a more limited concept, under which the creditor is restored to his original position. Modification denotes more severe changes in the relationship such as forcing creditors to take less than that to which they are entitled.

Similarly, as Judge Lumbard explains in *Taddeo*, Section 1322(b)(5) explicitly states that the right to cure exists "*notwithstanding* paragraph (2)" and its limits on residential mortgage modification. *In re Taddeo*, 685 F.2d at 27. Modification of a claim within the bankruptcy context refers to reducing the sum of the payments made on a claim. *Id.* at 27. Curing the default consists of making all the payments originally agreed upon. *See Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 1027 (Statement of Walter W. Vaughn on behalf of the American Bankers Association); *Hearings before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. 130.

The modification argument fails for another reason. The Code already "modifies" mortgagees' rights. The mere presence of 11 U.S.C. Section 362, which stays all debt enforcement activity, indicates an ability to modify the rights of mortgagees, e.g., their ability to accelerate or file a foreclosure action is stayed. Nor can they resort

to any other state remedies once the petition has been filed. The language contained in Section 1322(b)(2) must therefore be read in light of Section 362: not all modifications are prohibited, since Section 1322 does not preclude the application of Section 362.

D. *Under* Glenn *Sixth Circuit Debtors are Treated Differently Than Debtors in the Second Circuit.*

The Second Circuit has indicated expressly that the power to cure defaults extends to the post-foreclosure sale situation. The opinion in *Taddeo* cites with favor *In Re Thompson*, 17 B.R. 748, 753 (Bkrtcy W.D. Mich 1982) on two occasions. *In Re Taddeo*, 685 F.2d at 29. *Thompson* holds that the power to cure defaults is available to debtors retaining a redemption interest in the property, even though a sale has occurred.

To hold otherwise would be to adopt the mortgagees' position that Chapter 13 debtors may cure defaults only as provided by state law. However, that result ignores 11 U.S.C. Section 1322(b)(5) and is completely inconsistent with the "overriding rehabilitative purpose of Chapter 13". *In Re Davis*, 15 B.R. 22, 24 (Bkrtcy. Kan), aff'd, 16 B.R. 473 (D. Kan. 1981). *In Re Taddeo*, 685 F.2d at 29.

Thus, presented with the same facts as in the instant case, the Second Circuit would allow Mr. Miller and Mr. and Mrs. Pigloski to cure their defaults.

The problems with *Glenn* do not stop there. By deferring to state law concepts, the court allows debtors who are in essentially equivalent positions to obtain different results based on applicable state law. For example, in New York, foreclosure is a judicial procedure. A debtor may redeem the property at any time after final judgment but prior to the sale. New York Real Property Law, Sections 1341, 1351 (McKinney, 1979). During this time period but prior to the sale, the debtor has a common law equity of redemption.

In addition to that "redemption period", New York provides an additional period of time to redeem while the case goes through the judicial foreclosure proceedings. In *Taddeo*, the mortgagee commenced judicial foreclosure on October 9, 1979. By July 10, 1980 the sale had still not occurred. In essence, that New York debtor enjoyed a nine month redemption procedure prior to the sale.

Michigan mortgagees, on the other hand, foreclose primarily by advertisement. Mich. Comp. Laws Sections 600.3201 *et seq.* (Supp. 1985). The notice of sale need only be published for four (4) successive weeks. Mich. Comp. Laws Section 600.3208 (Supp. 1985). Thereafter, the mortgagor has either six months or one year, depending on the mortgage balance, to redeem the property. Mich. Comp. Laws Section 600.3240 (Supp. 1985).

If, however, *Glenn* is applied to both situations, the New York debtor has nine months after acceleration in which to seek protection under federal bankruptcy law, compared to approximately six to eight weeks for a Michigan debtor. Yet, *after* the foreclosure sale, the Michigan debtor enjoys rights under state law similar to those enjoyed by the New York debtor *prior* to the foreclosure sale. The Michigan debtor remains in possession of the property, maintains legal title and the right to sell the property, and enjoys the rents and profits from the property. Mich. Comp. Laws Section 600.3232; *Bankers' Trust Company of Detroit* v. *Rose*, 322 Mich. 256, 260, 22 N.W.2d 783 (1948).

If the "bright line" is applied to Ohio law, the disparity is even greater. After default in Ohio, the mortgagee has legal title, not the mortgagor. 47 Ohio Jur. 2d 129. The Ohio debtor can also be ejected, and if ejected, he loses his rights to rents and profits. However, since the foreclosure sale has not occurred, the Ohio debtor may cure the default, while the Michigan debtor may not.

In short, while the "bright line" approach may be convenient, it has the objectionable effect of preferring state property law distinctions to the detriment of the federal bankruptcy policy to rehabilitate debtors.

II. Legislative History and Intent Support the Conclusion That the Bankruptcy Reform Act of 1978 Compels the Allowance of Cure on the Debtor's Residence Under a Chapter 13 Plan.

A. *The Legislative History Confirms That Congress Intended a Meaningful Right to Cure Under Chapter 13 in Order to Protect Debtors' Homes.*

The legislative history of the Bankruptcy Code manifestly supports the proposition that Congress intended the cure provision contained in 11 U.S.C. Section 1322 (b) (5) to include the ability to cure defaults on home mortgages.[3]

> (T)he Commission recommends that the new Act authorize inclusion in any plan proposed under chapter VI, the successor to Chapter XIII of the present Act, provisions for the curing of defaults within a reasonable time and the maintenance of payments while the case is pending on claims secured by a lien on the debtor's residence and on claims secured by personal property on which the last payment is due after completion by the debtor of all payments under

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[3] This quotation also clarifies the language in 1322(b)(5) which suggests that the right to cure is limited to a "secured claim on which the last payment is due after the date on which the final payment under the plan is due". That original language was designed to make it clear that long term debts secured by personal property were distinguished from short term debts secured by personal property. Debts secured by a lien on the debtor's residence were always intended to be subject to a right to cure a default. Thus the quotation continues:

> With respect to short-term debts secured by personal property, the Commission recommends that the plan be permitted to include provisions dealing with such claims severally rather than generally as a member of a class of creditors. The proposal does not contemplate that the creditor so secured should be entitled to insist that the plan strictly preserve all of the terms of his original contract if the value of his claim against the property of the debtor is preserved. Insofar as there is a deficiency of the collateral to cover the claim of the secured creditor, he may be and should be treated as a member of the class of unsecured creditors. Report, Part I at 166.

Those provisions eventually became 11 U.S.C. Section 506.

> the plan. Report on the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 83-137, 93-137, 93d Cong., 1st Sess. Pts. I and II (1973), *reprinted in* Collier on Bankruptcy, App. 2 at 166 (15th Ed. 1981).

The above language was in response to frustration with the old Bankruptcy Act (the "Act").[4] Prior to adoption of the Code, the use of Chapter 13 was highly regional and sporadic. In enacting the Code, Congress sought to uniformly increase the relief available to individual debtors, in many cases eliminating the need of debtors to turn to the liquidation procedures available under Chapter 7.

> If a secured creditor is protected to the extent of the value of his collateral, there is no reason why he should be able to prevent the confirmation and consummation of a plan proposed by a debtor for the payment of his debts out of future income. Moreover, since Chapter XIII of the present Act is not carried in any form into the new Act, there is no reason for continuing the exclusion of a debt secured by real property used as a residence from the relief available to a debtor who proposes to pay his debts out of future income.
>
> Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93d Cong., 1st Session Pts. I and II (1973) *reprinted in* Collier on Bankruptcy, App. 2 at 166 (15th Ed.)

One of the co-sponsors of the bill that became the current Code further clarifies Congressional intent:

> These changes (in Chapter 13) will give personal debtors the protections they need to repay their debts, free from pressure of creditors who may not be willing to give the debtor a chance to try to work things out. We found that most individual debtors

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[4] As a result of that frustration, courts restrained foreclosure on personal residences even though the Chapter XIII plan theoretically could not provide for secured debts without the consent of the creditor. See *infra*, *Hallenbeck* v. *Penn Mutual Life Insurance Co.*, 323 F.2d 566 (4th Cir. 1963).

> that wind up in bankruptcy are there for causes beyond their control, such as illness, accidents, or job lay-offs. They are not deadbeats, but are honest citizens who need the fresh start that the bankruptcy laws can provide. That is why we do everything we can in this bill to facilitate repayment plans; and for those debtors that are just too far over their heads to attempt a Chapter 13 plan, that is why we give them the full protection of the bankruptcy laws, without the loopholes that have made bankruptcy an ineffective remedy and have frustrated the fresh start for many consumer debtors. 123 Cong. Rec. H11, 690-92, H11, 696-710 (daily ed. Oct. 27, 1977) (remarks of Rep. Edwards).

Congress realized, then, that a major problem with the Act was that creditors were unwilling to give debtors an opportunity to make defaulted obligations current. To remedy that defect, Congress intended that the cure provision of Section 1322(b)(5) include the ability to cure defaulted mortgages. The intent of the Code, which is to rehabilitate debtors and give them a "fresh start", would be defeated if the Code were interpreted in such a manner as to cause most debtors to lose their homes. As the district court in *Taddeo* stated, "it would be contrary to the spirit of Chapter 13 to permit the debtor to lose his residence when the payment of $2,944.78 would cure the default . . ." *In re Taddeo*, 15 B.R. 273, 276 (E.D.N.Y. 1981), *quoting In re Breuer*, 4 B.R. 499, 501 (Bkrtcy. S.D.N.Y. 1980). *See also In re Davis*, 15 B.R. 22 (Bkrtcy. D.Kan. 1981), *aff'd*, 16 B.R. 473 (D.Kan. 1981).

B. *Under the Bankruptcy Act, Bankruptcy Courts Used Injunctive Powers to Provide Relief to Debtors Attempting to Save Their Homes. A Contrary Result in the Present Case Would Thus Frustrate the Intent of the Bankruptcy Reform Act of 1978.*

Under the Bankruptcy Act, the bankruptcy courts used their equitable powers to enjoin foreclosures at any stage of state court proceedings to protect any equity of redemption for the benefit of the debtor's estate. The cases

addressing the issue approach it from the standpoint of whether enjoining the foreclosure proceeding was proper; the Act did not contain a provision comparable to 11 U.S.C. Section 1322(b)(5).

The leading case, *Hallenbeck* v. *Penn Mutual Life Insurance Company*, 323 F.2d 566 (4th Cir. 1963), involved a situation in which the holders of a deed of trust on the debtors' residence started foreclosure proceedings. The debtors filed a petition under Chapter XIII and sought to enjoin the mortgagee's foreclosure proceedings during the pendency of the plan. Although the Act did not allow the inclusion of claims secured by real property, the court held that it could enjoin the foreclosure to protect the equity of redemption. Since the Act provided for retention of jurisdiction by the court over any and all property of the debtor, without qualification as to the character of the property, the court held that it had jurisdiction even if the property interest was the equity of redemption. *Id.* at 569-70.

In holding that the injunction could issue, the court in *Hallenbeck* strongly emphasized the policy inherent in Chapter XIII wage earner plans:

> The general purpose of Chapter XIII is to afford a means of relief and rehabilitation to persons dependent upon their earnings from personal services by providing a method for effecting a composition with creditors, or extension of time to pay debts, or both.
>
> * * * *
>
> In addition to recognizing and giving effect to the plan provisions of the statute granting the injunctive power, the rationale of such decisions (granting the injunctions) is that the legislation is remedial in nature; it should be liberally construed to effect its purpose; i.e., relief to and rehabilitation of debtors; and it is quite apparent that in certain instances the power to enjoin foreclosure proceedings may properly be used to further that purpose.

Id. at 570-71.

See also, In re Freed & Company, 534 F.2d 1235 (6th Cir. 1976) (*Hallenbeck* applied to Chapter XI proceedings); *Chatman* v. *Daugherty*, 527 F.2d 691 (6th Cir. 1975) (injunction issued in Ch. XIII case to stop foreclosure of mechanic's lien on debtor's home); *In re Garrett*, 203 F. Supp. 459 (N.D. Ala. 1962) (mortgage foreclosure enjoined in Chapter XIII proceeding; cited with approval in *Hallenbeck*).

The Ninth Circuit also followed *Hallenbeck* in *In re Thomas J. Grosso Investment, Inc.*, 457 F.2d 168 (9th Cir. 1972), a Chapter X corporate reorganization petition. That bankruptcy was commenced at a time when the debtor's real property had been foreclosed upon and sold; Arizona, like Michigan, has a six month statutory redemption period during which the mortgagor retains legal title. The mortgagee argued that the redemption period could not be stayed under Sections 116 and 148 (presently combined into 11 U.S.C. Sections 362) because the final judgment and sale had extinguished the judgment lien and the debtor-creditor relationship ceased to exist. Instead, the mortgagee argued, a new relationship arose between the debtor and the purchaser.

The court rejected this analysis. It reasoned that a debtor holding a right to redeem does not have a new asset, but rather has legal title, which is the undivided remnant of his mortgagor's interest. As such, the trustee seeks to preserve an old asset rather than acquire a new one.

The court further stated that the stay sections of the Act must be read with regard for the purposes of reorganization: to protect the property of the debtor against threat of loss through execution. "If adequate protection is to be afforded it must remain available so long as the property remains to be protected until final title finally passes from the debtor to the purchaser." *Id.* at 172.

The court in *Grosso* also emphasized the need to properly characterize this type of issue, not as one of the strict nature of the rights of the parties under state

law, but as one of construction under federal law. The court held that "proceedings to enforce a lien" as used in the stay section required a construction that encompassed all proceedings leading to the divestiture of the debtor's title. *Id.* at 172.

It is obvious from the cases decided under the Act that the courts recognized the federal policy of allowing debtors an opportunity to cure the defaults on their homes and implemented that policy under the courts' broad powers, designed to effect that "fresh start." The Code, in its atempt to *increase* the relief afforded debtors, specifically provided such an opportunity by inclusion of Section 1322(b)(5). The reforms of the Code must not be extinguished by the maneuvers of creditors who attempt to circumvent its substance by exalting the form of acceleration clauses and foreclosure proceedings.

C. *The* Glenn *Opinion Represents a Judicial Compromise in the Name of Convenience and Fails to Interpret Federal Bankruptcy Law in Light of Its Overriding Rehabilitative Purposes.*

The *Glenn* court struggled valiantly with what at first blush is a difficult issue. The court was asked to interpret 11 U.S.C. Section 1322, which admittedly was a product of Congressional compromise. Despairing of finding any clear cut statutory language or legislative history pointing to a construction of the statute that is free from challenge, the *Glenn* court chose to take what it characterizes as a pragmatic, compromise position, instead of looking to the overriding rehabilitative purposes of the statute.

The *Glenn* court states:

> The result we reach here is, therefore, primarily a pragmatic one—one that we believe not only works the least violence to the competing concerns evident in the language of the statute but also one that is most readily capable of use. (A-14a).

The *Glenn* court also states:

> The language of the statute is, to us, plainly a compromise as we have earlier mentioned. Picking a

> date between the two extremes is likewise a compromise of sorts. (A-14a).

Petitioners suggest that compromise is basic to the legislative function. It is often necessary in order to have enough votes to enact statutes. Without compromise the work would not get done. Compromise is entirely appropriate in that arena.

The situation is quite different in the case of the judiciary. When faced with questions of statutory construction, it is the court's job to interpret statutes in accordance with their overriding legislative purpose, even when there is room for a contrary construction. As the Second Circuit stated in *Cawley* v. *United States*, 272 F.2d 443 (2d Cir. 1959):

> It is a familiar maxim of statutory interpretation that the court should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation. See *Markham* v. *Cabell*, 326 U.S. 404 (1945);

The Congressional intent in enacting the new Chapter 13 of the Bankruptcy Code has been stated several times but no where more accurately than in the House Report on the Code, H.R. Rep. No. 595, 95th Cong., 1st Session 116-117 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6077-78:

> The purpose of Chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period.
>
> * * * *
>
> The benefit to the debtor of developing a plan of repayment under Chapter 13, rather than opting for liquidation under Chapter 7, is that it permits the debtor to protect his assets.
>
> * * * *
>
> The benefit to the creditors is self evident; their losses will be significantly less than if their debtors opt for straight bankruptcy.

Specifically, Section 1322(b)(5) indicates a policy of enabling debtors to save their homes. *In Re Ivory*, 32 B.R. 788, 792 (Bkrtcy. D. Ore. 1983). As stated by the *Ivory* court:

> The rehabilitative purpose of Chapter 13 in general and the literal language of Sec. 1322(b)(5) in particular further support this view. Chapter 13 was intended to give a debtor with regular income the opportunity to reorganize his debts in order to retain his assets, while at the same time repay his debts in accordance with a court approved plan. Sec. 1322 (b)(5) clearly envisions the debtors retention of his primary asset, the family residence. (citation omitted.)

Thus, opting for convenient and pragmatic results the *Glenn* court loses sight of one of the purposes of Chapter 13; namely, affording wage earners the opportunity to retain their primary asset, the residence.

III. A Chapter 13 Debtor May Pay the Entire Redemption Amount Through a Chapter 13 Plan.

Unlike Miller and Glenn, the other debtors who were parties to the decision below, Petitioners Pigloskis offered to "redeem" their homestead by paying the entire redemption amount legally due and owing through their Chapter 13 Plan.

The *Glenn* court rejected this proposition when it adopted its compromise position that a debtor's ability to save his residence through a Chapter 13 Plan is cut-off at the sheriff's sale. In so doing the Sixth Circuit failed to give proper consideration to the rehabilitative purposes of 11 U.S.C. Sections 1322(b)(3) and (b)(10). The Sixth Circuit also did not give consideration to the role of the automatic stay which acts to preserve the bankruptcy estate and the status quo while the Chapter 13 Plan is performed.

A. *The Rehabilitative Purpose of Sections 1322(b)(3) and (b)(10) Mandates That Chapter 13 Debtors May Pay the Entire Redemption Amount Through Their Chapter 13 Plan.*

In Re Kokkinis, 22 B.R. 353 (Bkrtcy M.D. Ill. 1982) identified 11 U.S.C. Sections 1322 (b)(3) and (b)(10) as those provisions which allow the debtor to pay the entire redemption amount through the life of the Chapter 13 Plan.

In so doing the *Kokkinis* court looked to the rehabilitative purpose of Chapter 13, construing 1322(b)(3).

> This court will not permit an acceleration provision to inhibit debtor rehabilitation. The debtors herein propose to cure their default by paying both the arrearages and the remaining balance owed to the plaintiff over the life of their plan. Since Section 1322(b)(3) allows for the curing of any default, this court holds that the debtors are entitled to cure their default in the manner that they have proposed. *Id.* at 355.

The court also found authority for allowing the debtors to pay the redemption amount through their Chapter 13 proceedings in Section 1322 (b)(10) which states that the plan may include any appropriate provisions not inconsistent with Title 11. The court states as follows:

> The debtors also argue that since Chapter 11 expressly allows the de-acceleration of a debt, 11 U.S.C. Section 1124 (1979), a similar right should exist under Chapter 13. This court finds support for this argument in Section 1322(b)(10) of the Bankruptcy Code, which states that the plan may include any other appropriate provisions not inconsistent with Title 11. *See also In Re Taddeo*, 9 B.R. 299 (Bankr. E.D.N.Y. 1981), *aff'd*, 15 B.R. 273 (E.D.N.Y. 1981) . . . *Id.* 355-356

Glenn dismisses *Kokkinis* with little discussion merely stating that most of the reasons that cut against reinstatement of the mortgage terms also argue against redemption. *Glenn.* (A-29a).

However, redemption through a Chapter 13 actually allays most of the concerns expressed by the *Glenn* court.

First, redemption is a clearly recognized right under state law that is at the heart of many foreclosure schemes. It is a specific event that is as identifiable as is the foreclosure sale.

Second, by redeeming, the debtor pays the entire amount bid by the purchaser at the sale minimizing any chilling effects that the rare third party purchaser may have.

Third, redemption through a Chapter 13 Plan has a finite time. Chapter 13 establishes a limit of three years or less for most plans absent cause. 11 U.S.C. Section 1322(c).

Fourth, since redemption would occur only in those states that have redemption periods, a purchaser at a sale will be well aware of the possibility that the remedy is available to the mortgagor. Surprise to the bidder is not an issue.

Thus, careful consideration of the right to redeem under 11 U.S.C. Sections 1322(b)(3) and (b)(10) significantly undermines the *Glenn* rationale. An examination of the role of the automatic stay in conjunction with the redemption arguments further weakens the vitality of *Glenn*.

B. *The Automatic Stay Provisions of the Bankruptcy Code, 11 U.S.C. Section 362(a) are Designed to Maintain the Status Quo, Preserve the Debtors' Estate and Assist in Debtors' Rehabilitation by Tolling State Redemption Periods During the Life of a Chapter 13 Plan.*

Petitioners submit that the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. Section 362(a) operate to toll state redemption periods and allow debtors to pay the entire redemption amount through their Chapter 13 Plan. In rejecting this position *Glenn* cited a line of cases which do not give proper emphasis to the

fundamental purpose of the automatic stay. (A-18a). The stay's purpose is well stated in the legislative history:

> The Automatic Stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives a debtor a breathing spell from his creditors. It stops all collection efforts, harrassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The Automatic Stay also provides creditors protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation proceeding under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents this. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S. Code Cong. & News 5787, 6296.

In order to implement the legislative purpose stated above, the automatic stay must be construed liberally to give full protection to debtors and creditors. As stated in *In re Johnson*, 8 B.R. 371, 374 (Bkrtcy. D.Minn. 1981), "too narrow an interpretation of the scope of this section will allow the disintegration of the estate".

Furthermore in light of the broad scope of the automatic stay provisions, convoluted arguments are required to escape its impact. Thus *Glenn* is reduced to arguing that the automatic stay, which forbids any act to obtain possession of property of the estate or to perfect or enforce any lien against property of the estate, does not toll periods of time. This is true even though the running of time periods have the effect of taking property of the estate.

Johnson easily rejected this argument stating:

> This is too restrictive a definition of those terms. "Enforcement" means causing to have effect or making effective. The running of the redemption period is the act which gives effect to a judgment of foreclosure. See Min. Sat. Sec. 588.12. An "act" as used in Section 362 means more than just an overt action by the creditor. It includes all changes in the relationship between the debtor and his creditors. Standing alone, the running of time is an "act" if it triggers a change in the relationship of the parties.

Id. at 374.

Glenn also argues that 11 U.S.C. Section 108(b) precludes 11 U.S.C. Section 362(a) from tolling redemption periods. The theory is Section 108(b) explicitly addresses the running of periods of time and would be superfluous if Section 362 also addresses time limits. This argument is aptly refuted in *In Re H&W Enterprises, Inc.*, 19 B.R. 582, 587 (Bkrtcy. N.D. Iowa. 1982) where the court looked to the plain language of the statutory provisions involved:

> Pertinent time allotments in 11 U.S.C. Section 108 (b) are not completely extraneous as statutory time periods designed to control the Trustee's activity if emphasis is given to the language of 11 U.S.C. Section 108(b) which states that the Trustee has until the end of a specified time period, "*including any suspension of such period, occurring on or after the commencement of the case*", to act. 11 U.S.C. Section 108(b). A suspension of the running of a state law redemption period by 11 U.S.C. Section 362(a) could be considered just such an 11 U.S.C. Section 108(b) "suspension of such period." Under such a reading, the 11 U.S.C. Section 108(b) period would not even begin to run until after the stay was lifted. Given such a reading of the two sections, there is no conflict between 11 U.S.C. Section 108(b) and 11 U.S.C. Section 362(a). (emphasis supplied by the court) (footnote omitted).

In short the *Glenn* opinion cannot withstand close scrutiny. Its arguments against redeeming in a Chapter 13 plan are strained and only serve to undermine the effectiveness of Chapter 13.

CONCLUSION

This petition presents this Court with an opportunity to resolve a theoretical and practical conflict between the circuits, and reaffirm the federal bankruptcy policy to encourage Chapter 13 repayment plans. The Sixth Circuit's opinion in *Glenn* narrowly interprets a federal bankruptcy law that was designed to reform the prior Bankruptcy Act and allow for the curing of mortgage defaults. *Glenn* conflicts with the Second Circuit opinion in *Taddeo*, which reaffirms the federal principles of debtor rehabilitation while adequately protecting creditors. Finally, *Glenn* even restricts the manifest right of a debtor to redeem his homestead under a Chapter 13 Plan. In order to have that conflict resolved, and the scope of Chapter 13 clarified, Petitioners respectfully request that their petition for certiorari be granted.

Respectfully submitted,

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